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No. [illegible]

In the Supreme Court of the United States

OCTOBER TERM, 1964

WILLIAM PAUL KEUSSER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 336

WILLIAM PAUL KRUEGER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Vol. II, 1-7) is reported at 331 F.2d 283.

JURISDICTION

The judgment of the court of appeals was entered on April 21, 1964 (Vol. II, 8). A petition for rehearing was denied on June 1, 1964 (Vol. II, 13). Mr. Justice Goldberg extended the time for the filing

of a petition for a writ of certiorari to July 31, 1964, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether the jury's acquittal of petitioner on a conspiracy count required a new trial of the substantive counts for improper joinder of offenses and defendants.

STATEMENT

A 28-count indictment returned in the United States District Court for the Western District of Missouri charged petitioner and four others with mail fraud and conspiracy to commit mail fraud, in violation of 18 U.S.C. 1341 and 371, respectively (Vol. I, 1-18). Three co-defendants each pleaded guilty before trial to one substantive count and to the conspiracy count (Vol. I, 169, 170, 223-228, 234-235, 242, 269-270). After a jury trial, petitioner was found guilty on four substantive counts and acquitted of conspiracy and fourteen other substantive counts (Vol. I, 202-204).* He was sentenced to concurrent terms of imprisonment of two years on each of the counts and made eligible for parole under 18 U.S.C. 4208(a)(2) (Vol. I, 243). The court of appeals unanimously affirmed (Vol. II, 1-7, 8).

The pertinent facts may be summarized as follows:

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* Seven counts were dismissed at the trial on the government's motion (Tr. 1192).

From 1956 to 1958, co-defendant Hanlin was president of the Mid-west Manufacturing Company and the Hanlin Manufacturing Company of Kansas City, Missouri (Tr. 556, 557, 602). These corporations, which owned no plant or physical equipment, sold cigarette vending machines manufactured by another concern (Tr. 556-557).

During 1957 and 1958, petitioner and others worked as salesmen for Hanlin (Tr. 574-575). Hanlin, who paid the manufacturer $60 for each machine, sold the machines to the salesmen for $70 or $80 (Tr. 557-558). The salesmen, in turn, sold the machines to their customers for about $200 apiece and paid the freight charges and the installation costs (Tr. 558, 591-592, 596). Hanlin furnished the salesmen with printed contract forms and photographs of the machines (Tr. 558). The salesmen advertised the product and sold the machines to various individuals. The sales orders and checks for the purchase price were mailed to Hanlin (Tr. 558, 579), who filled the orders and shipped the merchandise (Tr. 558). After taking his share of the proceeds, Hanlin mailed the balance of the purchase price to the salesmen (Tr. 593).

During this period, petitioner sold a number of cigarette vending machines to individuals in various states. To one customer, petitioner identified himself as "Kirkpatrick" and, after showing photographs of the "De Lux" model, stated that each of those machines would earn $100 per month, and that the tobacco companies would pay the customer at least $20 per location (Tr. 413). The customer then purchased ten "De Lux" models, but the machines actually re-

ceived were not the same as those shown in the photographs (Tr. 410-411). Petitioner told another purchaser that his company sold vending machines at a loss but made its profit from money paid by a local tobacco distributor on sales of cigarettes (Tr. 509-510). He said that the purchaser would earn at least $200 per month (Tr. 511). Petitioner and a co-defendant "guaranteed" another purchaser an income of at least $100 per month and said that it could be as much as $333 if the machines were placed in good locations (Tr. 68). They represented that the machines would be easy to place because they were superior to others on the market (Tr. 70).

The orders for the machines and payments therefor (in the form of cashiers' checks) were mailed to Hanlin. Thereafter, Hanlin wrote to the purchasers acknowledging receipt of the orders and checks, indicating the anticipated dates of shipment, and providing other information (Tr. 76, 155, 157, 417, 513-514, 576-578). These letters were mailed as part of the routine of the business (Tr. 909 (62)).

The machines developed mechanical trouble almost as soon as they were placed on location (Tr. 157, 160-161, 164, 181, 190, 422-424, 518, 520). One purchaser had to remove all his machines within six days (Tr. 518, 520). Another said that the longest any machine remained on location was about two weeks, and that he finally gave them to a used metal distributor (Tr. 160-165). All the purchasers lost money on their investments (Tr. 164, 190, 424, 432-433, 517).

ARGUMENT

Petitioner contends (Pet. 3-7) that the government improperly indicted and tried him for conspiracy, and that as a result he was prejudiced by the introduction of otherwise inadmissible evidence. Apart from the fact that this contention was not raised below, and is not, therefore, available as a ground for reversal in this Court, *e.g.*, *Lawn* v. *United States*, 355 U.S. 339, 362 n. 16, the point has no merit. In *Schaffer* v. *United States*, 362 U.S. 511, 516, this Court held that there was no "hard-and-fast formula that, when a conspiracy count fails, joinder is error as a matter of law." In the instant case, the interrelationship among Hanlin and his salesmen was so substantial that the jury could properly have found them all to have been engaged in one overall scheme to defraud the purchasers of cigarette vending machines and to utilize the mails in furtherance thereof. It was no bar to such a finding that each salesman did not participate in all of the individual frauds, or even that all the salesmen may not have known one another. *Blumenthal* v. *United States*, 332 U.S. 539, 556-558. That the jury chose to find petitioner guilty only on the counts charging his direct sales to customers did not establish, as a matter of law, that the conspiracy count was improper. For even under the dissenting views of *Schaffer* v. *United States*, *supra*, misjoinder is not established if a jury, notwithstanding evidence of conspiracy, finds certain joined defendants not guilty of that offense: "Once the conspiracy is supported by evidence, it presents

issues for the jury to decide. What may motivate a particular jury in returning a verdict of not guilty on the conspiracy count may never be known." 362 U.S. at 523-524. The jury in this case was able to differentiate among the substantive counts notwithstanding the evidence of conspiracy, as is demonstrated by its acquittal of the petitioner on the conspiracy charge and on a number of substantive counts.

CONCLUSION

For the reasons set forth, we respectfully submit that the petition for a writ of certiorari should be denied.

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